carriage in the remaining systems. The posture of cable systems within the same ADI can differ greatly. A broadcast station could require must-carry of a large cable system in the station's designated community and thus achieve leverage to exact significant retransmission consent fees from smaller systems in the ADI. The smaller cable system, which is usually less able to withstand pressure, will get hurt if stations are free to discriminate in their elections. This whip-saw effect will only exacerbate the effect on smaller systems' rates and their ability to compete with other multichannel video providers including, perhaps, larger cable systems. In fairness, then, each broadcast station should make an election which applies to its entire ADI.

4. Applicability to SMATV and MATV.

The Commission asks whether the definition of "multichannel video programming distributor," the class of entities to whom retransmission consent applies, should be read to include SMATV and MATV systems. The 1992 Cable Act defines the term "multichannel video programming distributor" broadly to include:

> a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive - only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.[17] (emphasis added).

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[17]Section 2(c)(6) of the 1992 Cable Act adds a new definition of a "multichannel video programming distributor" to Section 602 of the Communications Act of 1934.

Although SMATV and MATV systems are not specifically delineated in the list of examples contained in the definition, the statutory language is clear that the definition of a multichannel video programming distributor is not limited to the examples given and encompasses any person who makes available multiple channels of video programming for sale to subscribers. Indeed, the legislative history makes clear that the term "multichannel video programming distributor" was to be interpreted broadly, especially with respect to the retransmission consent requirement, stating that:

> The Committee believes, based on the legislative history of this provision, that Congress' intent was to allow broadcasters to control the use of their signals by anyone engaged in retransmission by whatever means. (Emphasis supplied.)[18]

Significantly, the statute does not require a separate charge to be imposed for broadcast retransmission service in order for the retransmission consent requirement to apply. As long as all three elements of the statutory definition are met, i.e., the entity: (1) makes available multiple channels of video programming (broadcast, non-broadcast or both); (2) for purchase; (3) by subscribers or customers, that entity qualifies as a multichannel video programming distributor and must obtain retransmission consent for any television broadcast station which it retransmits, subject to the exceptions enumerated in the statute. For example, a landlord providing

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[18]S. Rep. No. 92, 102d Cong. 1st Sess. 34 (1992) ("Senate Report").

MATV service as amenity to his tenants would not be considered a multichannel video programming distributor since multiple channels of video programming were not being made "available for purchase". Accordingly, the retransmission consent provisions of the statute would not apply and the MATV system would function in precisely the same manner as a roof top antenna on an individual home. In contrast, where a SMATV, MATV, MMDS or other multichannel video service provider makes multiple channels of video programming available for purchase, the retransmission consent provisions clearly require the consent of any broadcast stations which are also being provided over the same system, regardless of whether a separate charge is imposed for the broadcast retransmission service. Moreover, MATVs, SMATVs, MMDS and other similar technologies are in direct competition with cable systems, which is yet another policy and equitable reason for treating all such entities alike under Section 325(b).

The Commission has acknowledged that the term "multichannel video programming distributor" is used extensively throughout the statute.[19] However, the statute provides only a single definition of multichannel video programming distributor. The retransmission consent provisions

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[19]The Notice acknowledges that the term "multichannel video programming distributor" is used in the sections of the 1992 Cable Act dealing with effective competition (Section 3), program access (Section 9), program ownership (Section 11), program carriage agreements (Section 12) and equal employment opportunity (Section 22). Notice at ¶42.

of the statute do not provide any basis to impose a separate or different definition of multichannel video programming distributor for retransmission consent purposes than for the other statutory provisions. Indeed, in extending the Communications Act's equal employment opportunity provisions to all multichannel video programming distributors, the legislative history of the 1992 Cable Act makes clear that Congress considered SMATV systems to be multichannel video programming distributors. The House Report states that:

> Section 634(h)(1) is amended to extend the requirements of this section to not only cable and satellite master antenna television operators but to any multichannel video programming distributor. (Emphasis supplied.)[20]

This language indicates that Congress viewed both cable systems and SMATV systems to be included within the larger category of multichannel video programming distributors. Thus, it is clear that the retransmission consent requirement was intended to apply to all multichannel video programming distributors.

D. Relationship Between Must-Carry and Retransmission Consent.

The Commission has requested comment on its tentative conclusion that cable operators may count channels used for the carriage of local retransmission consent stations to meet the channel set aside requirements of Section 614.[21] The legislative history of the retransmission consent provisions in

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[20]H.R. No. 628, 102d Cong. 2d Sess. 113 (1992) ("House Report").

[21]Notice at ¶54.

the 1992 Cable Act supports the Commission's conclusions that Congress intended channels used to carry local retransmission consent stations be counted towards the number of channels which cable operators are required to set aside for the carriage of local signals. The Senate Report states unequivocally that:

> [T]he FCC's rules should provide that carriage of a station exercising its right of retransmission consent will count towards the number of local broadcast stations that a cable system is required to carry under sections 614 and 615.[22]

Similarly, the sectional analysis of Section 6 of the 1992 Cable Act contained in the Senate Report states:

> [T]he election of certain stations to negotiate with cable systems for retransmission consent will not have any effect on the rights of other stations to signal carriage under sections 614 or 615. However, the Committee intends that stations which exercise their retransmission consent rights and are carried by cable systems will be counted toward the total number of stations required to be carried under sections 614 and 615.[23]

Clearly, Congress recognized that a station, which otherwise meets the definition of a local station to which the set aside provision applies, does not become any less local merely by electing to negotiate retransmission rights in lieu of asserting must-carry.

E. **Reasonableness of Rates.**

The Commission correctly notes that Section 325(b)(3)(A) of the 1992 Cable Act requires the Commission to consider the

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[22]Senate Report at 37-38.

[23]Senate Report at 84.

impact of retransmission consent on rates for basic service to ensure that such rates are reasonable.[24] Although the Commission has indicated that it plans to leave this issue for its rate proceeding, several points deserve mention here. The Commission is correct that retransmission consent fees are a direct cost of providing basic service, and thus cable operators must be allowed to pass through the costs of retransmission consent fees as well as any increases to such fees directly to subscribers without having to obtain approval of a franchising authority. However, the Commission also has an affirmative obligation to ensure that retransmission consent terms demanded by broadcasters are not unreasonable. Thus, the Commission must adopt a policy prohibiting a station from unreasonably refusing to grant retransmission consent.[25]

To the extent that the Commission allows stations in their sole discretion to choose to refrain from granting retransmission consent, the Commission can and should prevent the public from being deprived of programming that would result if such stations were allowed to require network non-duplication and syndicated exclusivity blackouts. One of the Commission's main justifications for reimposing syndicated

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[24]Notice at ¶66.

[25]This is consistent with long established policy developed under the retransmission consent provisions of Section 325(a) of the Communications Act. See, e.g., Roanoke Telecasting Corp., 20 RR 2d 613 (1970); The Heart of the Black Hills Stations, 21 RR 2d 429, affirmed 21 RR 2d 1003, affirmed 22 RR 2d 436 (1971).

exclusivity and expanding network non-duplication protection was to redress the perceived market imbalance resulting from the loss of must-carry rights by broadcasters. The Commission gave syndicated exclusivity and expanded network non-duplication rights to broadcasters as leverage to assist them in obtaining cable carriage which they could no longer demand as a matter of right.[26] This rationale, however, no longer holds true given the fact that the 1992 Cable Act gives broadcasting stations far broader must-carry rights than they have enjoyed under previous versions of the Commission's rules and, in addition, unprecedented control over the use of their signals via the retransmission consent provisions. In a situation where a broadcast station does not wish to be carried on the cable or seeks to exact an unreasonably high price for such cable carriage, there is no public policy to be served by allowing that station to deprive cable viewers of syndicated or network programming received from other sources.

II. MUST-CARRY REGULATIONS.

A. **Carriage of Local Non-Commercial Educational Television Stations.**

Qualified Local NCE Stations. By definition, a municipal NCE station must transmit "predominantly non-commercial

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[26]Indeed, this is exactly why, unlike its original syndicated exclusivity and network non-duplication rules which were in effect when must carry was in place and only applied to stations actually carried on a cable system, the new syndicated exclusivity rules allow stations which are not being carried on the cable system to assert blackout rights. See Report and Order in Gen. Docket No. 87-24, 3 FCC Rcd 5299 (1988).

programs for educational purposes." The Commission seeks comment on proposals to define what "predominantly" and "educational purposes" mean. The Commission proposes that a municipal NCE station, to be eligible for must-carry status, transmit non-commercial educational programming for at least 50% of its broadcast week.[27] However, Newhouse suggests that the Commission may want to adopt a more rigorous standard, such as 80%, in order to more fully effectuate Congress' goal to "promot[e] access to distinctive noncommercial educational television services."[28] As to the definition of "educational purposes," the Commission proposes to utilize the eligibility requirement for licensees of non-commercial educational television stations contained in Section 73.621(a).[29] Newhouse respectfully suggests that the Commission did not intend to limit the scope of "educational purposes" only to the requirements of subsection (a) of Section 73.621 of its rules, but rather that Section 73.621 in its entirety, subsections (a) through (g), must be satisfied to meet this definition. Subsections (b) through (g) of that rule should apply as well. Municipal NCE stations should surely have to meet the same test as other NCE stations.

Principal Headend. Must-carry status is granted to an NCE station if the reference point of the NCE station's community

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[27]Notice at ¶8.

[28]Section 615(e).

[29]Notice at ¶8.

of license is within 50 miles of the principal headend of the cable system, or if the station's grade B service contour covers the principal headend of the cable system. Moreover, a "good quality" signal must be delivered to the principal headend to maintain must-carry status. Thus, the location and definition of the term "principal headend," which is not defined in the Act, is a crucial issue for making the determination of whether a qualified NCE station must be carried.

The Commission correctly proposes to permit cable operators to choose the location of their own principal headends. As the Commission knows, many cable systems have multiple headend facilities. The choice should be left to a good faith determination by each cable operator. The designation of a cable operator's principal headend could be included on an amended Form 320 which would require each system to note the coordinates of its chosen principal headend. The location of a system's principal headend should be permitted to be changed upon a reconfiguration of the cable system by the cable operator. This could happen, for example, as a result of a cable system rebuild, when a cable system acquires an abutting cable system, or if headend facilities are consolidated through interconnection.

Signal Carriage Obligations. The Commission notes that it must define when programming is "substantially duplicated," for purposes of the medium-sized system exception regarding state

educational networks and for large-sized systems.[30] Newhouse submits that the definition should be the same for both purposes. There is no reason to have different definitions and the use of different definitions will only cause confusion. It is our belief that "substantially duplicated" is a less demanding standard than the use of the term "predominantly" which is used in the definition of a municipal NCE station. Therefore, the Commission's proposed use of a 50% duplication standard is excessive. In its place, Newhouse suggests that substantial duplication should be defined as 14 non-simultaneous weekly prime time hours, the definition used in the Commission's former must-carry rules.[31] This is a much better gauge for ensuring that multiple NCE offerings are "distinctive," not duplicative.

B. **Carriage of Local Commercial Television Stations.**

Location of a Cable System. The location of a cable system's principal headend is important to the must-carry rules for commercial stations in a different way than for NCE stations. Here it is necessary under the statute in order to be able to measure whether a good quality signal is being delivered to the cable system. The Act requires that a "good quality" signal be delivered to a cable system's principal headend in order to maintain must-carry status. As stated above in our comments on the NCE rules, the cable operator

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[30]Notice at ¶12.

[31]47 C.F.R. §76.5(j) (1984) (deleted).

should be charged with the obligation of identifying the location of its principal headend.

As to market location, the Commission correctly notes that a cable system may be located in more than one ADI because it is a multiple community system which is technically integrated. For example, the Newhouse system in Rome, NY and environs is located partly within the Utica, NY ADI and partly within the Syracuse, NY ADI. Likewise, the Oneonta, NY system is located in the Utica, NY and Binghamton, NY ADI's. In such situations where an integrated cable system serves communities in more than one ADI, the cable system should be considered located only within one ADI. To rule otherwise would place an undue must-carry burden on the cable system. The cable operator should be able to choose the ADI in which it will be considered located.[32] If this choice is contested, the location of either the system's principal headend or center of system coordinates (as reported to the FCC) in the chosen ADI should be considered prima facie evidence in favor of the cable operator. Any remaining anomalies can be dealt with through the local market adjustment procedures raised in paragraphs 18 through 20 of the Notice.

Television Market Definition and Status. With regard to the definition of a television market, the Act refers to a

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[32]Because of the May 1, 1993, initial election date advocated by Newhouse, this election will have to be made as soon as possible after the release of the rules in this docket (e.g., 15 days) in order to provide broadcasters with the most time to make their election.

section of the Commission's rules which uses Arbitron's Area of Dominant Influence ("ADI") definition of a market. Under that definition, every county in the contiguous United States is assigned to only one ADI. These assignments are based on the shares of the county's total estimated television viewing hours. The market whose home stations achieve the largest total share gets that county assigned to its ADI. As the Commission notes, some ADIs may be as small as one county, while other ADIs are very large. Moreover, ADIs are sometimes influenced by cable carriage of signals in distant counties where the signals could not be received off the air.

Although changes in ADIs are done on an annual basis by Arbitron, Newhouse submits that the regulatory scheme requires considerably more certainty. ADI markets should be frozen for Commission purposes, i.e., the most current ADI listing as of the date the rules are adopted should be used. To allow changes to be made every time Arbitron shifts a county from one ADI to another would create a chaotic situation for cable systems located in those counties. It also puts the changing fate of regulated cable systems in private hands which are making ADI changes for entirely different reasons.

Newhouse agrees that there will sometimes be valid regulatory reasons for a community to be considered as being located in one station's market rather than another. One illustrative example is presented by the Lincoln-Hastings-Kearney, NE ADI. Newhouse operates a cable system in Lincoln.

The only network station in Lincoln is affiliated with CBS. There is an ABC affiliate in Kearney, which is about 145 miles from Lincoln. There is an NBC affiliate in Hastings, some 90 miles from Lincoln. The Lincoln system carries the ABC and NBC affiliates from Omaha, not the Hastings and Kearney stations. This is because Omaha is less than 50 miles from Lincoln, much closer than the other two communities. Moreover, people in Lincoln identify with Omaha, shop in Omaha and are generally more interested in what is happening there. Another similar example is presented by Newhouse's cable system in Prince George's County, MD. That county is in the Washington, D.C. ADI, but the cable community is located closer to Baltimore, its citizens identify with Baltimore at least as much as Washington, and the system has historically carried several Baltimore television stations. The Commission must be cognizant of such factors in deciding on market change petitions filed under Section 614(h)(1)(C) of the Act.

Market change requests should be advanced by a cable operator or a television broadcast station in a petition for special relief pursuant to the procedures contemplated by Congress in Section 614(h)(1)(C). Newhouse believes that market determinations should only be changed by the special relief process once the Commission's rules have been placed into effect. Meanwhile, as the Act states, the status quo should be maintained pending the resolution of any request for a market change. The only exception to this rule would be

where the cable operator and the directly affected broadcast station are in agreement over the relief requested in the petition. In that case, the relief asked for could be conditionally implemented pending Commission action on the request.

CONCLUSION

Newhouse urges the Commission to pay close attention to the effect its rules will have on existing signal carriage. The interest of the cable subscriber in maintaining the present level of service should serve as a guide. Loss of service is not what Congress intended.

Respectfully submitted,

NEWHOUSE BROADCASTING CORPORATION

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Cable vows to reconsider station shifts

Council grills NewChannels

• More Council, 3A

By BOB BOLFE
Senior staff writer

CORNING — Corning NewChannels will re-evaluate several controversial channel changes it made last week, the Common Council was told Monday night.

Andrew M. Nigolian, systems manager, said the shifts were made on the basis of a survey of cable users. But of some 4,000 questionnaires sent out in October, 464 responses were received — about 18 percent. No alderman nor anyone else in the council chamber said they had been queried.

The shifts were made to avoid network program duplication during peak viewing hours, Nigolian said. The company has no control over individual station programming of syndicated programs they buy for non-peak hour showing, although one resident said the game show "Jeopardy" can be seen simultaneously on five channels at one point in the day.

The largest number of complaints received to date have stemmed from the dropping of WKBW Buffalo and its replacement with The Discovery Channel, an educational offering. "It was hard for me to realize that many people watched Buffalo news (on WKBW)," Nigolian said. "I'm finding out (now) there were quite a few."

Several people in the audience expressed displeasure that WTBS Atlanta and The Weather Channel, previously available only to "Cablextra" package subscribers who pay an additional fee, were now part of the basic service.

Nigolian said he plans to add more services to Cablextra — hopefully by the end of January — but is being delayed by "technical and contractual problems."

Fire Commissioner Gregory Barulich complained of the loss of CHCH, the independent Hamilton, Ont., channel, because it was an excellent source of hockey games. Nigolian said other sports services offering more NHL hockey are under consideration.

Nigolian said one long-term possibility is the expansion of basic service beyond the present 13-channel system through issuance of converter boxes that up the channel access rate to all subscribers, not just those with Cablextra. But this would necessitate a higher service fee, he said. No cost estimate has been made as this option has not yet been studied in detail.

Responding to a question from Alderman John J. Philip, I-5, who asked that the cable changes be put on the council's agenda, Nigolian said his system receives a "slight" commission for local sales made over the new home-shopping channel services. But he said the revenue does not cover service costs.

Philip said his constituents are almost unanimously opposed to the changes — a contention echoed by Alderman Frank Coccho, D-8.

Nigolian said he would continue to monitor the situation — which has already resulted in his office being "flooded" with calls — and offered to report back to the council.

JOHN J. PHILIP, I-5, brings TV issue to council.

ANDREW M. NIGOLIAN, cable systems manager.

Even sees for b

'It doesn't

WASHINGTON (AP) — Se
Republican Leader Bob
said today he doesn't t
President Reagan's $1.
trillion fiscal 1988 budget "h
prayer" of being accepted
Congress.

The president's budget
also, was being dismissed
unworkable by congressi
Democratic leaders.

"I think it's a starting po
that's about all that can be
for it," said Dole, R-Kan.

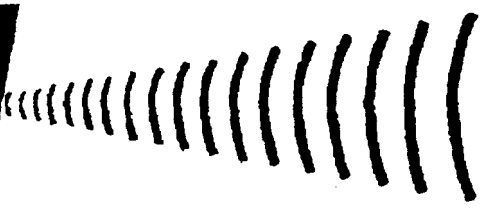
Dole said the administra
deserved credit for its effort,
he added, "to reach it
numbers, they probably u
some smoke and mirrors jus
Congress does from time
time."

"We ought to stop the
dance about all the little figu
in the budget, and move on
see what we can do and do it
quickly as we can," Dole said.

"The administration wants
work with Congress. We w
Congress to take us seriousl

ATTACHMENT 1

MICROWAVE ALERT!



Attention: WILLIAM MUENCH,JR

WHY CARRY A SIGNAL WITH REGULATORY PROBLEMS WHEN YOU CAN CARRY A SIGNAL FREE FROM REGULATORY BURDENS WITH HIGH NATIONAL VIEWERSHIP?

You are carrying at least one signal via microwave. That creates problems for you.

On November 19, the FCC released their Notice of Proposed Rule Making on Broadcast Signal Carriage for implementation of the 1992 Cable Act.

- Superstations delivered via satellite are exempt from retransmission consent...signals such as **WGN, WPIX, KTVT,** and **KTLA.**
- All microwave signals are subject to retransmission consent. (This excludes educational stations.)

The FCC specifically states that commercial broadcast stations received via microwave are not exempt from retransmission consent. While the rules won't be finalized until April, 1993, the FCC's direction on this matter is clear.

Right now switch before the next copyright period beginning 1/1/93.

Turn on our four services that are free from retransmission consent -- **WGN, WPIX, KTVT,** and **KTLA** -- along with our full marketing support programs.

You make the decision and we'll switch you on within 5 minutes. Your UVI representative is on alert -- call **1-800-331-4806.**

Sincerely,

Reuben Gant
Vice President, Sales

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